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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

All of the matters raised in the Petition for Writ of Certiorari in this Petition No. 1498 were raised and argued in the October Term, 1968 Petition for Writ of Certiorari filed by petitioner, Reese Hubbard, in Petition No. 1235. This Court denied certiorari on May 19, 1969 (cert. den. 395 U. S. 908, 23 L. Ed. 2d 221) and also denied rehearing on June 23, 1969 (rehearing den. 395 U. S. 987, 23 L. Ed. 2d 776). There are no new issues of fact and law argued in this petition that were not fully reviewed in the October Term, 1968 Petition for Writ of Certiorari, No. 1235.

The costs and attorney's fees were taxed against Hubbard by the Court of Appeals under 28 U. S. C. § 1927 (A. 33). There were no contempt charges of any kind filed against him. The costs and attorney's fees assessment were based on the fact that the appeals involving the two trials and the new trial order "could have been simplified or perhaps avoided but for the behavior of Hubbard" (A. 41).

QUESTIONS PRESENTED.

Was it not finally and conclusively decided in this Court's denial of certiorari in No. 1235 that the Court of Appeals Order taxing costs and attorney's fees against attorney Hubbard was justified on the record? Even a cursory comparison of the Petition for a Writ of Certiorari filed in No. 1235 and this Petition reveals all of the re-argument of the law of this case by the petitioner Hubbard.

Does the recent decision of *Mayberry* v. *Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133, a criminal contempt case where the defendant was sentenced to 22 years imprisonment, have any effect on the power of the Court of Appeals to tax costs under 28 U. S. C. Sec. 1927 relating to the vexatious conduct of an attorney?

As we stated in our brief for respondent in opposition in No. 1235:

> "2. Can a trial lawyer of years of experience repeatedly make false statements to the court; attempt to improperly influence a jury by the introduction of statements not in evidence under the pretext of laying a foundation for impeachment but never carrying through; examine witnesses on an exhibit never offered

in evidence; repeatedly make known meriless objections both in trial and pretrial phases of he case for the purpose of harassment; delay and prolong the proceedings by falsely denying agreements previously made for depositions; secrete a deposition in his office and prevent its filing; allege inflammatory material in his opening statement and then never offer any proof of the same; cause the necessity of two trials of a personal injury by his actions, and then claim that he should not be liable for excessive costs?

3. Can the respondent Hubbard reasonably argue that his conduct is unintentional or accidental when in the second trial of this case he again engaged in shocking trial practices such as attempting to slip an excluded exhibit into the jury room when such exhibit was on numerous occasions ruled inadmissible by the court; repeatedly misquote portions of depositions to the jury leaving out material unfavorable to his client; misquote the transcript of the first trial record on cross-examination of a witness; filing an untimely abortive notice of appeal six months after the new trial order requiring plaintiff's counsel to file a short record on appeal with the Court of Appeals and to obtain by motion and briefs the dismissal of the abortive appeal; to be found guilty of misconduct in numerous other cases in the Illinois Appellate and Supreme Courts and the Court of Appeals and then claim that the new trial was granted in this case 'simply because it (the court) dislikes either the verdict or the lawyer?'

4. Does the phrase 'Independence of the Profession' offer a covenient word shield to those who seek to misuse the license of this honorable profession?

5. Is a lawyer entitled to a jury trial before the court may assess costs for his misconduct occurring in the presence of the court and imposed after notice, motion, hearing and briefs and not under civil or criminal contempt?

6. Is not the award of costs a proper method available to an aggrieved plaintiff to be made whole who has been put to additional costs and expenses by a defense lawyer engaged in blatant misconduct for the purpose of economically pulverizing the opposition by costly tactics?''

STATUTES AND RULES INVOLVED.

The following statutory and rule provisions, some of which are reprinted in Appendix A, involved are: U. S. C. § 1912 (Damages and Costs on Affirmance); 28 U. S. C. § 1927 (Counsel's liability for Excessive Costs); Federal Rules of Appellate Procedure, Rule 38 (Damages for Delay); Federal Rules of Appellate Procedure, Rule 39 (Costs).

STATEMENT OF THE CASE.

This case was a personal injury negligence case against the Las Vegas Hacienda Hotel. The Hacienda was defended by Petitioner Re[illegible]e Hubbard in both trials that occurred. The first trial was before District Judge Edwin Robson and resulted in a not guilty verdict for the defendant. Judge Robson granted a new trial based upon counsel Hubbard's trial misconduct and also ordered Hubbard to pay certain costs and attorney's fees to the plaintiff's attorneys (A. 11-18). At the second trial before District Judge Bernard M. Decker, Hubbard was again found to be engaged in unethical trial practices (A. 30-31). Nonetheless, the verdict in the second trial was a $100,000.00 award to the plaintiff for her injuries. Hubbard and Hacienda filed three appeals; one from the new trial order; one from the order granting fees and costs; and one from

the second trial verdict. The Court of Appeals upheld the new trial order; reversed in part the award of fees and costs; and upheld the $100,000.00 second trial verdict. In doing so, the Court of Appeals assessed costs and fees against Hubbard because of the "additional proceedings" caused by his misconduct (A. 14-36), 404 Fed. 2d 1163 at 1172:

> "The court further finds under 28 U. S. C. § 1927 that because of the additional proceedings caused by the conduct of Reese Hubbard, this matter is remanded to the trial judge for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54-page brief and the additional Appendix in No. 15976 and a sum no greater than one-third (⅓) of plaintiff-appellee's attorneys' fee incurred in the appeal of cases numbered 15933, 15976, and 16210."

Hubbard then filed a Petition for Writ of Certiorari (No. 1235) to this Court. The Petition for the Writ was denied and a Petition for Rehearing on the denial of certiorari was also denied. In spite of this, Mr. Hubbard and his associates continued to cause "additional proceedings" in this case. After the denial of certiorari the cause was returned to District Judge Bernard M. Decker for the purpose of establishing a dollar amount for the one-third plaintiff's attorney's fees in accordance with the direction of the Court of Appeals. After examination of all the briefs filed in this case, Judge Decker found that $15,000.00 would have been a fair and reasonable fee for all of the appellate work done on these appeals. However, on September 23, 1969 he assessed an attorney's fee of $4,000.00 to be paid by the petitioner, Reese Hubbard (A. 46-46a). Hubbard then appealed to the Court of Appeals from this $4,000.00 judgment. On December 23, 1970 the Court of Appeals entered an Order affirming the judgment (A. 39-42).

ARGUMENT.

REASONS FOR NOT GRANTING THE WRIT.

ALL OF THE ISSUES RAISED BY THIS PETITION FOR CERTIORARI WERE DISPOSED OF IN THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI PREVIOUSLY FILED HERE OVER TWO YEARS AGO IN NO. 1235. THE SAME ISSUES ARE REARGUED IN THIS PETITION.

The denial of the Writ of Certiorari in No. 1235 should have settled once and for all the validity of the Court of Appeals Order taxing costs and attorney's fees under 28 U. S. C. § 1927 in this case. The Opinion of the Seventh Circuit Court of Appeals, 404 Fed. 2d 1163, set the costs and attorney's fees (one-third of the appeal attorney's fees) to be awarded the plaintiff's counsel as a result of the misconduct of attorney Reese Hubbard. It was *this* opinion that petitioner sought to have reviewed in his Petition for a Writ of Certiorari No. 1235. After the denial of this Petition, the case was remanded for the purpose of having the dollar amount determined by the District Judge (note: a judge different than the judge who granted the new trial and the costs and attorney's fees reversed by the Court of Appeals). After this dollar amount ($4,000.00) was determined by Judge Decker, Hubbard again appealed to the Seventh Circuit Court of Appeals and re-argued all of the issues and points that he had unsuccessfully asserted before this Court and on countless occasions below. The Court of Appeals in its Order of December 28, 1970 (A. 39) reestablished the validity of the prior Order for fees and costs. It is this Order that is now in issue on the

pending Petition for Writ of Certiorari, not the costs or attorney's fees originally allowed by Judge Robson after the first trial of this case, 39 F. R. D. 592-596 (A. 35-41). The Court of Appeals in approving the fees and costs taxed under the statute (28 U. S. C. § 1927) stated:

> "Hubbard once again attacks the validity of our assessment of attorney's fees on appeal as he also did before the Supreme Court in his Petition for Certiorari. We need not reconsider that issue since it is the law of the case. Nonetheless, we reaffirm the assessment we made in our prior opinion." (A. 40.)

Attorney Hubbard has now been held to have been guilty of professional misconduct in the two trials of this case by District Court Judge Robson (A. 11-18), District Court Judge Decker (A. 30-31) and twice by the Court of Appeals (A. 19-36, A. 39-42).

His trial tactics have been accurately described to fit into the following categories (A. 29):

"(1) Making misstatements of fact and law to the jury and the courts:

(2) Using harassing and obstructionist tactics in pretrial discovery:

(3) Injecting inflammatory statements into argument which were calculated to prejudice the jury; and

(4) Conducting improper cross-examination on matters not in evidence or on issue to which the Court had already sustained objection."

In the second trial of this case Hubbard tried to slip an exhibit into the jury room that had been repeatedly excluded from evidence (A. 31). In spite of all the findings herein, he persists in harassing plaintiff's counsel in seeking once again to have this matter reviewed by the Supreme Court. These tactics are dilatory. Judge Kerner obviously considered them as such when he entered the Order denying a stay of mandate on January 20, 1971.

A comparison of the "Questions Presented for the Court's consideration in Petition of Writ of Certiorari, No. 1235, and the same "Questions Presented" in this Petition No. 1498 clearly demonstrates that this is merely a re-argument of a case already decided.

No. 1235.

"1. Will not the independence of the bar be irreparably injured if, as here, months after a civil trial, a trial lawyer may be punished summarily for 'objectionable trial strategy by the trial judge through an award of costs' including attorney's fees, which was entered against the attorney:

(a) without giving him any advance notice of the charges to be defended;

(b) without permitting him any opportunity to confront and cross-examine his accusers;

(c) without allowing him any opportunity to present evidence corroborative of his factual statements made during trial; and

(d) without making specific findings of fact and conclusions of law which would determine the issues on appeal?"

No. 1498.

"1. May a federal judge, long after the trial of a civil case, summarily punish a trial lawyer for 'objectionable trial strategy' through a substantial judgment, under the guise of 'costs' without according that lawyer an evidentiary hearing as to disputed factual issues?"

"4. Is not a lawyer, accused of misconduct during the trial of a lawsuit, entitled as a matter of fairness, to:

(a) advance notice of the charges to be defended;

(b) an opportunity to confront and cross-examine his accusers;

(c) an opportunity to present evidence corroborative of his factual statements made during trial; and

(d) specific findings of fact and conclusions of law which would structure the issues on appeal."

No. 1235.

"2. May the strict limitations of constitutional due process, of the direct contempt statute, and of the summary contempt rule all be cavalierly swept aside, simply by changing the name of the proceeding from 'contempt' to 'costs', and by making the resulting award to opposing counsel rather than to the government as a 'fine?'" 18 U. S. C. § 401; F. R. Cr. Proc. 42(a).

No. 1498.

"5. Were not petitioner's rights violated although the proceeding was called 'costs' rather than 'contempt.'"

No. 1235.

"3. Was 28 U. S. C. § 1927 enacted to enable a federal court to ignore the foregoing limits on its power to punish a trial lawyer?"

No. 1498.

"2. Can 28 U. S. C. § 1927 be extended to authorize such a procedure?"

"6. Does 28 U. S. C. § 1927 create a new category of taxable 'costs' or does that section simply shift to an attorney the burden of paying such items as 'costs' as might otherwise be taxed to the client?"

No. 1235.

"7. Did not both courts below err in receiving statements from opinions in other cases, to which Reese Hubbard was not a party, as conclusive evidence of 'objectionable trial strategy' in this case?"

No. 1498.

"8. Was it not error, and a denial of due process, to receive opinions from several past cases, in which petitioner was not a party, as evidence of 'objectionable trial strategy?' Did not the Court of Appeals compound that error by basing its decision on matter which was neither urged to, nor relied on by the trial court?"

Thus, it is crystal clear that there are no new issues presented in this petition. Therefore, we will not reargue what has been resolved in the denial of the writ (No. 1235). We merely direct the Court's attention to our 41-page brief in opposition filed in No. 1235, which we incorporate by reference as part of this brief.

THIS CASE DOES NOT INVOLVE CIVIL OR CRIMINAL CONTEMPT. THE COSTS AND FEES WERE TAXED BY THE COURT OF APPEALS UNDER 28 U. S. C. § 1927.

Petitioner Hubbard has argued that *Mayberry* v. *State of Pennsylvania*, No. 121 (1/20/71) ..... U. S. ....., 91 S. Ct. 499, 39 L. W. 4133 has application to this case. The *Mayberry* decision does not apply here because it involves criminal contempt. This case does not involve criminal or civil contempt. Mr. Hubbard's conduct, correctly described as "outrageous in nature" by the Court of Appeals, consisted primarily of trial tactics which would deprive the plaintiff of her right to a fair trial. His misconduct consisted of serious and studied acts calculated to disrupt the

orderly processes of justice. He did not, however, act in an insulting or contemptuous manner toward the Court as in the *Mayberry* case. The trial court here never sought to punish Hubbard for contempt. The Court of Appeals assessed the costs and attorney's fees because Hubbard's conduct unduly extended the case and caused "additional proceedings." (A. 33.)

> "Both 28 U. S. C. § 1912 and § 1927 empower us to make such awards when an appeal is frivolous, creates delay or when the conduct of an attorney is deemed reprehensible" (A. 40-41).

Petitioner argues at great length about Judge Robson's Order assessing costs and fees. The fact of the matter is that this Order was reversed in part and remanded (A. 33-34). The Order taxing costs and attorney's fees now before the Court was made by the Court of Appeals and not by Judge Robson. There was certainly nothing of a personal nature or "insults of the kind apt to strike at the most vulnerable and human consciousness of a judge's temperament" as described in the *Mayberry* decision.

The award in the case at bar was neither criminal nor civil contempt, involved no fine and no stigma of contempt. It was purely remedial since its purpose was to make the plaintiff whole again for costs needlessly and futilely expended as a result of the misconduct of Attorney Reese Hubbard.

Significantly, the federal courts in civil contempt cases have consistently held that it is proper to assess attorneys' fees and costs as a compensatory remedy to restore the injured party to his former position. The civil contempt power to award a compensatory attorney's fees is also based on the inherent judicial powers of the court. There can be no doubt that Reese Hubbard's conduct could have formed a basis for civil contempt if such had been sought.

See Annotation 55 ALR 2d 979, "Allowance of Attorneys' Fees in Contempt Proceedings"; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 67 L. Ed. 719, affirming 281 F. 488 (7th Cir. 1923) (An award of reasonable attorneys' fees may in the discretion of the court be awarded in civil contempt); *Nelson* v. *Steiner*, 279 F. 2d 944 (CA-7, 1960); *Crane* v. *Gas Screw Happy Pappy*, 367 F. 2d 771 (CA-7, 1966) (The Court approved an award of $2,500 in attorneys' fees, expenses and damages, and also additional attorneys' fees and costs in the appeal); *Lance* v. *Plummer*, 353 F. 2d 585, 592 (CA-5, 1965) (Allowance of attorneys' fees and costs to injured party in civil contempt under the Civil Rights Act of 1964 was clearly compensatory and not improper as being punitive).

THE COURT OF APPEALS HAD AUTHORITY TO AWARD ATTORNEY'S FEES AND COSTS FOR THE MISCONDUCT OF HUBBARD.

The court of appeals had the power to award attorneys' fees, damages and interest in view of the conduct of Petitioner Hubbard. Federal Rules of Appellate Procedure No. 38 and 28 U. S. C. Sections 1912 and 1927 have been interpreted as authority.

The action of the Second Circuit recently in a case similar in conduct to the case at bar, clearly demonstrates the scope of this authority. In *Oscar Gruss & Son* v. *Lumberman's Mutual Casualty Company*, 422 F. 2d 1278 (CA-3, 1970), the court invoked the aforementioned authorities and awarded the plaintiff ten percent interest on his judgment, counsel fees of $7,500 on appeal and double costs. In so doing, the Court of Appeals stated:

> "In any event, on the basis of the conduct of the appeal alone, we regard this as an appropriate case for invoking both 28 U. S. C. § 1912, which provides:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

and F. R. A. P. 38, which states:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

In view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge, we exercise our discretion under the statute and rule as follows: Gruss is awarded an additional four per cent interest on the judgment appealed from, double costs on Lumbermens' appeal, and $7,500 in attorney's fees."

Courts of appeal have recognized their power to award attorneys' fees, double interest, damages and costs in cases of frivolous appeals or in the face of reprehensible conduct under the authority of Section 1912, and general powers. *In re Midland United Co.*, 141 F. 2d 692 (CA-3, 1944) ($1,000 attorneys' fees plus all costs); *Jones* v. *Schellenberger*, 225 F. 2d 784, 794-795 (CA-7, 1955), (Reprehensible conduct of defendant toward plaintiff); *Lowe* v. *Willacy*, 239 F. 2d 179 (CA-9, 1956) (Attorney's fees and costs awarded); *Dunscompe* v. *Sayle*, 340 F. 2d 311 (CA-5, 1965). cert. den. 382 U. S. 814 (1965). (Double costs awarded); *Ginsberg* v. *Stern*, 295 F. 2d 698 (CA-3, 1961) ($500 attorney's fees awarded).

The Notes of the Advisory Committee on Appellate Rules under F. R. A. P. 38 state regarding Section 1912 and Appellate Rule 38:

> ". . . the courts of appeal quite properly allow damages, *attorney's fees* and other expenses incurred by

> an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay". (Emphasis supplied.)

Petitioner's argument concerning the award to respondent here for the Court of Appeals brief printing and printing the additional appendix lacks force in view of the new Federal Rules of Appellate Procedure. Rule 39 in the absence of "misconduct" automatically allows such costs to the prevailing party. The petitioner makes no mention of this authorization in his Petition.

Petitioner's reliance on the authority of *Fleischman Corp.* v. *Maier Brewing*, 386 U. S. 714 (1967) is misplaced. The Court of Appeals in the case at bar readily pointed out as follows:

> "The case relied on by Hubbard, *Fleischman Corp.* v. *Maier Brewing*, 386 U. S. 714 (1967), itself recognized that attorney's fees could be awarded in exceptional circumstances and in the interests of justice." (A. 41.)

CONCLUSION.

In addition to the aforementioned reargument of all the issues decided in Petition for Writ of Certiorari, No. 1235, two years ago, a large portion of the present petition is dedicated to a renewal of the old argument made by Mr. Hubbard throughout these proceedings: that he was never really guilty of any professional misconduct in either this or any other case. We submit that it taxes the patience of this Court to again read through these arguments after all of the findings of misconduct by two Federal District Court Judges and by the Court of Appeals speaking through Judge Kerner. The actions of the petitioner are incredible but consistent with the prior opinion of the Court of Appeals which labeled them as "outrageous." Respondent's attorneys are a two-man law firm. Petitioner obviously

delights in throwing every possible roadblock and expense into the path of the respondent. Petitioner iss well aware that the expense incurred in the printing of tthis brief in opposition to the Petition for Certiorari is nott recoverable under the Supreme Court rules. We suggesst that petitioner's purpose in reapplying for a Writ oof Certiorari is to cause respondent and her attorneys untolld additional expense and brief writing time.

For the foregoing reasons it is respectfully prayed that the Petition for Writ of Certiorari filed by petititioner Reese Hubbard be denied.

Respectfully submitted,

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APPENDIX A.

STATUTES AND RULES.

UNITED STATES CODE:

28 U. S. C., § 1912 (Damages and Costs on Affirmance).
See Petitioner's Appendix A, p. 7.

28 U. S. C., § 1927 (Counsels' Liability for Excessive Costs).
See Petitioner's Appendix A, p. 9.

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 38. (Damages for Delay.)

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 39. (Costs.)
See Petitioner's Appendix A, p. 4.